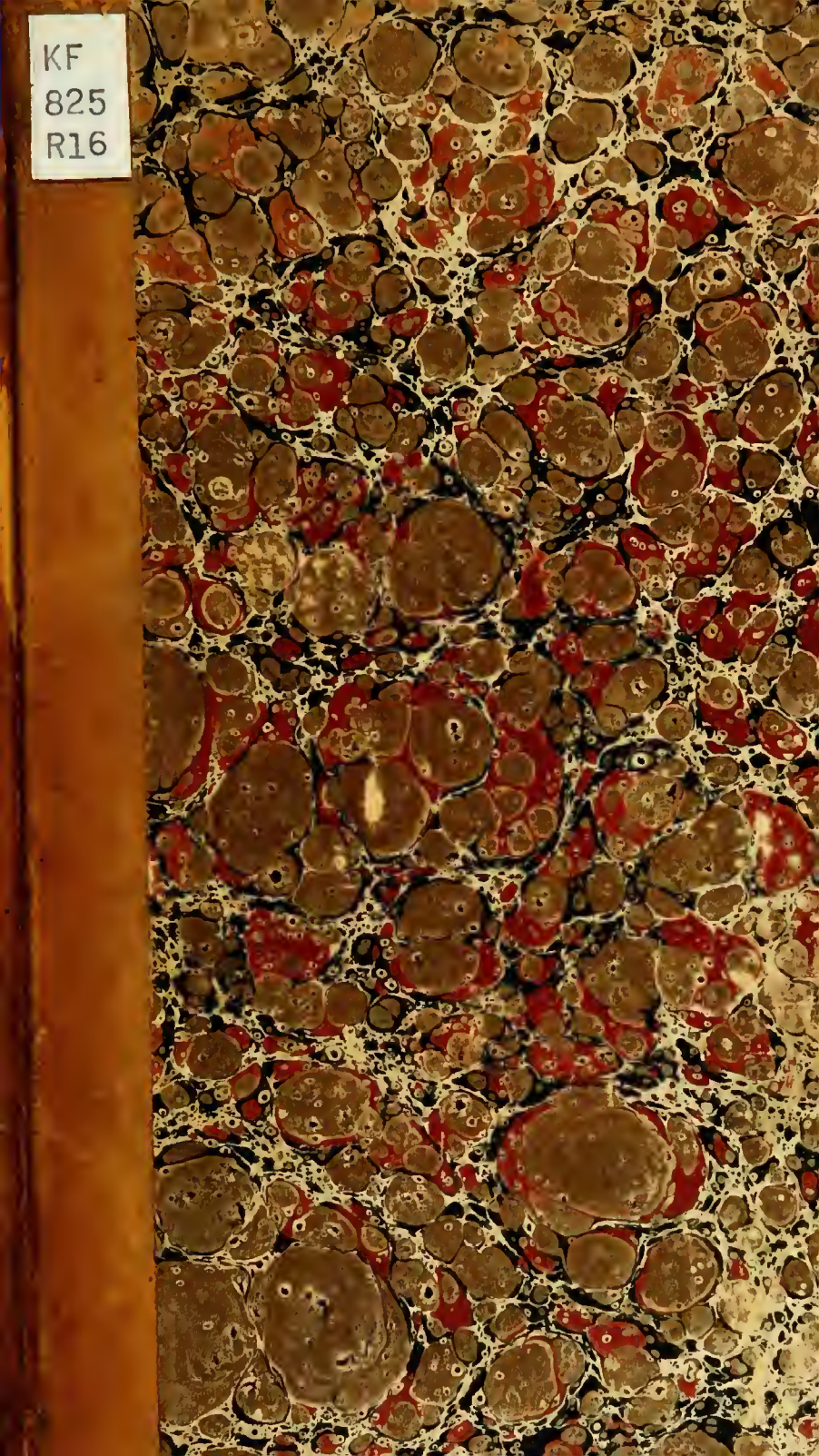

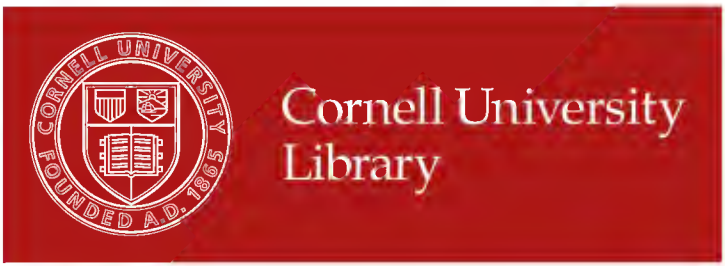

THE

PRINCIPLES OF THE LAW

RELATING TO THE

DISCHARGE OF CONTRACTS.

BY

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THE

DISCHARGE OF CONTRACTS.

Mr. John William Smith, in his Treatise on the Law of Contracts, has explained the different kinds of contracts, and shown what is essential to their validity. In the present work, which is meant to be read in connection with that of Mr. Smith, we shall endeavor to point out the ways in which a contract may be discharged.

When we speak of a contract as having been discharged, we mean that the legal relations which it created have ceased to exist. The discharge may be brought about in the following ways:

1. By the mutual agreement of the parties that the contract shall no longer bind either of them.
2. By compliance with provisions in the contract which make it determinable under certain circumstances.
3. By performance of the contract.
4. By the occurrence of events which render performance of the contract impossible.
5. By breach of the contract, which puts an end to the contractual relation, and gives one party a right of action against the other.
6. By the operation of rules of law upon certain sets of circumstances.

We shall take up each of these modes of discharge in its order.

CHAPTER I.

DISCHARGE OF CONTRACT BY AGREEMENT.

A contract may be discharged in the same way that it was made, that is, by the mutual agreement of the parties. This new agreement, like every other simple contract, must be supported by a consideration. It may expressly rescind the old contract; it may alter some of its terms, leaving those which remain unchanged; it may be an entirely new and independent contract, which is so far inconsistent with the old one that they could not subsist together, in which case the old contract is impliedly discharged; or it may change the parties to the original agreement, without affecting the manner of its performance.

Section 1. Express Rescission.

An executory contract—that is, one which has not been acted upon—may be discharged by the simple agreement of the parties that it shall no longer bind either of them. The consideration for the promise of each party is the renunciation by the other of his rights under the contract. Each abandons his rights in consideration that the other will do the like. And it must be shown that the agreement was mutual, and not a mere waiver of his rights by one party.[1] Thus, in an action for breach of promise of marriage, the defendant pleaded that, before breach, he had been *exonerated and discharged* by the plaintiff from the performance of his promise. It was objected that the plea was bad, in that it showed a mere waiver by the plaintiff, unsupported by any consideration. The court held that the form of the plea was allowable; "Yet we think," said Al-

[1] Blood *v.* Enos, 12 Vermont 625.

DERSON, B., "that the defendant will not be able to succeed upon it * * * * * * unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this, in effect, will be a rescission of the contract." [1]

But this rule applies to the contract only so long as it remains executory; for when it has become executed wholly or in part by the passage of a consideration, it cannot be discharged by a simple agreement, but only by performance of its terms, by a release under seal, or by an accord and satisfaction.[2] To illustrate:—If A, in consideration of certain services to be rendered by B, promises to build a house for B, before the work has been begun the parties may release each other from all the obligations which they have incurred, by simply agreeing to abandon the contract. But if A entered upon the work and built the house, an agreement to rescind the contract would be without consideration; A would surrender his claim to B's services, but B would give nothing in return. So, if the contract were broken one party would become entitled to a right of action against the other, and a mere waiver of the right without any consideration, or the formality of a seal, would not be binding.

In England promissory notes and bills of exchange form an exception to the rule which we have stated. The obligations created by such instruments may be discharged by express waiver, without any consideration.[3] The reason for this difference, which is given by BARON PARKE in the case of Foster *v.* Dawber,[4] is, that bills of exchange are governed by the law merchant, which was imported into England from countries where a debt might be released by express words,

[1] King *v.* Gillett, 7 M. & W. 55.
[2] Foster *v.* Dawber, 6 Ex. 839.
[3] Foster *v.* Dawber, 6 Ex. 839.
[4] 6 Ex. 839.

unaccompanied by any satisfaction or solemn instrument, and promissory notes, having been put upon the same footing with bills of exchange by Statute 3 & 4 Anne, c. 9, are governed by the same rule.

In America the exception is not recognized, and commercial instruments are treated as upon the same footing with ordinary simple contracts.[1]

Section 2. Change of Terms.

As an executory contract may be altogether discharged by mutual agreement, so it may be changed.[2] The parties may rescind the first contract, and then make a new one upon whatever terms they please. But it is not necessary that they should expressly rescind the old contract. If they alter its terms it is equivalent to making a new contract, consisting of the new terms and what remains unchanged of the original contract. The old agreement being incorporated in the new, the latter must be construed with reference to it.[3] Suppose a contract to deliver one hundred barrels of flour of a certain brand, at a certain time and place, and upon certain stipulated terms of payment, were subsequently altered by making the number of barrels to be delivered five hundred, instead of one hundred. This would be a substitution of a new contract in place of the old one, but as it would have to be construed with reference to the latter, the conditions of brand, delivery, and payment would be as much a part of it as they were a part of the original contract.

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[1] Crawford *v.* Millspaugh, 13 Johns. 87; Seymour *v.* Minturn, 17 Id. 169; Bender *v.* Sampson, 11 Mass. 42; Notes to Cumber *v.* Wane, 1 Sm. L. C. (8th Am. ed.) 667–8.

[2] McNish *v.* Reynolds, 95 Pa. St. 483; Brown *v.* Everhard, 52 Wis. 205.

[3] Carr *v.* Wallachian Petroleum Co., L. R. 1 C. P. 636.

In the case we have supposed both sides of the contract are changed by the new agreement. The undertaking of each party to do something different from that which he first agreed to do, furnishes a consideration for the promise of the other. Where, however, only one side of the agreement is changed, unless the old contract be rescinded, the new agreement will be without consideration. If A contract to do work for B for one thousand dollars, while the contract is still in force a subsequent promise by B to pay him fifteen hundred dollars would be a mere gratuitous undertaking, for a promise to pay a man for doing that which he is already bound to do, is, obviously, as barren of consideration as a promise to pay a man for doing nothing.[1]

When the old contract has been rescinded the parties are discharged from all their obligations under it, and, of course, may make a new agreement upon whatever terms they please. If, in the case last supposed, A should refuse to do the work which he had contracted to do, unless B would agree to pay him fifteen hundred dollars, and B should assent to his demands, the original contract would be dissolved by mutual agreement. Or perhaps it would be more correct to say that the old contract would be broken. At the common law a man has a choice either to perform his contract, or to break it and pay damages. Now A, by refusing to perform, has broken his contract. He has made himself liable to B in an action for damages, but he is no longer under any obligation to go on with the work. If B is anxious to have the work completed, and would rather pay an additional sum to A to go on with it, than leave it unfinished and bring an action against him for damages, there is nothing to prevent his making such an arrangement. A may agree to finish the work in consideration

[1] Seybolt *v.* N. Y., L. E., & W. R. R. Co., 95 N. Y. 562.

that B will abandon his right of action against him and pay him a sum of money greater than that originally agreed upon, and as A is not under any obligation to perform the original agreement, his promise to go on with the work is a sufficient consideration to support B's promise to pay him for his labor, and B's right of action is discharged by his accepting A's new liability in satisfaction.[1]

The case of Holmes *v.* Doane[2] furnishes a good illustration of the practical application of this principle. There, A agreed to carry B in his vessel to California, if B, who was a carpenter, would work in preparing her for sea, and during the voyage. Before the vessel was ready for sea A refused to carry B, unless he would sign the shipping papers, and pay twenty-five dollars. B assented to this arrangement, and signed the papers, but failing to pay the amount agreed upon was left on shore by A, against whom he subsequently brought suit. The court held that he could not recover. DEWEY, J., in delivering the judgment, said: "The defendant might show that, at a period prior to the sailing of the vessel, he gave notice to the plaintiff that he would not comply with his original agreement, and would hold himself responsible for all damages by reason of such breach of contract; and that the plaintiff thereupon elected not to avail himself of his right to recover damages therefor, but chose to make a new contract, giving the defendant more advantageous terms, * * * * * and such new contract would be a valid contract between the parties."

Thus it is apparent that by refusing to perform a contract one party may obtain the upper hand, and

[1] Lattimore *v.* Harsen, 14 Johns. 330; Munroe *v.* Perkins, 9 Pick. 298; Magarity *v.* Shipman, 2 Mackey (D. C.) 334.

[2] 9 Cushing 135.

dictate his own terms to the other. But this result is rather to be attributed to the doctrine of the common law, that a man may either fulfil his agreement, or break it and pay damages, than to the principle that an executory contract may be varied by a new agreement.

Section 3. New and Inconsistent Contract.

The new agreement may have no reference to the original contract, but may be an entirely new and independent contract relating to the same subject. If the two agreements are inconsistent with each other, so that they cannot subsist together, the old one is impliedly discharged by the new one. Thus, where A made an agreement with B for the performance of various literary labors, and subsequently a new agreement was entered into between them by which A agreed to devote his whole time and attention to the editing of a certain newspaper, it was held that the second agreement rescinded the first on the ground of inconsistency.[1]

It results from the doctrine that a new and inconsistent agreement will discharge a former contract, that a surety will be discharged if the principals alter the original contract in any material point. As the surety is not a party to the new agreement he is not bound by it, and he is not liable under the original contract for that has been discharged by the new agreement.[2]

Section 4. Change of Parties.

A contract may be discharged by an agreement which, while leaving the manner of performance unchanged,

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[1] Patmore *v.* Colburn, 1 C. M. & R. 65; see also Taylor *v.* Hilary, Id. 741; Thornhill *v.* Neats, 8 C. B. N. S. 831; Bacon *v.* Cobb, 45 Ill. 47; Stow *v.* Russell, 36 Id. 18; Chrisman *v.* Hodges, 75 Mo. 413.

[2] Whitcher *v.* Hall, 5 B. & C. 276; General Steam Navigation Co. *v.* Rolt, 6 C. B. N. S. 550; Polak *v.* Everett, L. R., 1 Q. B. D. 669.

substitutes new parties in place of those originally bound. This process is sometimes called *novation*, a term borrowed from the civil law.[1] Suppose A owes B one hundred dollars, and B owes C one hundred dollars, the three may meet and agree that, instead of A paying B, and B paying C, A shall pay the money directly to C; C accepts A as his debtor and discharges B, and B in his turn discharges A. The consideration for A's promise to pay C is the abandonment by B of his claim against A; for B's release of A, C's release of B; and for C's release of B, A's promise to pay him the one hundred dollars. Thus there is a consideration for the promise of each.[2] In a case where H sold a wagon to A, who afterward sold it to C, and C agreed to pay H, who consented to accept him as his debtor instead of A, it was held that the debt due by A to H was extinguished.[3]

The principle is frequently applied when a partnership is changed by the retirement of a partner, or the addition of new members to the firm. When a partner retires from a firm and a new member is taken in to fill his place, the creditors of the old firm may agree to release the retiring partner, and look to the new firm for the payment of their claims.[4] As the new partner is not liable for the debts of the old firm, his assumption of liability is a sufficient consideration for the creditor's promise to release the retiring partner. "I apprehend the law to be now settled," said PARKE, B.,[5] "that if one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three

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[1] Inst. Lit., III, xxx, § iii; Mackeldey's Roman Law, § 538.
[2] Tatlock *v.* Harris, 3 Term. 180; 1 Pars. on Conts. *217.
[3] Heaton *v.* Angier, 7 N. H. 397.
[4] Kountz *v.* Holthouse, 85 Pa. St. 235; Story on Part., §§ 152, 153.
[5] In Hart *v* Alexandor, 2 M. & W. 484, 493.

parties—the creditor, the old firm, and the new firm—be transferred to the new firm."

Section 5. Form of New Agreement.

We have now pointed out how a contract may be discharged by a new agreement. It remains to consider the form in which it is necessary to express the new agreement. And first we shall speak of the discharge of a contract under seal, and then of the discharge of a contract which is required by the Statute of Frauds to be in writing.

It is a very old maxim of the common law that every contract or agreement ought to be dissolved by matter of as high a nature as that which first made it obligatory—*Unumquodque dissolvitur eodem ligamine quo ligatur.*[1] Consequently, at the common law, a contract under seal could not be discharged or varied by a subsequent parol agreement. It was no answer to an action for a breach of covenant, that the defendant had abstained from performing at the request of the plaintiff, although if he had been prevented from performing by the immediate act of the plaintiff he would have been excused. In West *v.* Blakeway[2] an action of covenant was brought by the executor of a lessor against the lessee, upon a covenant in the lease to yield up the demised premises at the expiration of the term, together with all erections and improvements which should be made during the term. The breach assigned was the removal of a greenhouse. The defendant pleaded, that it was agreed between the lessor and himself that if he would erect a greenhouse upon the demised premises he should be at liberty to pull it down and remove it at the expiration of the term, and that he, confiding in the agreement, did erect such a greenhouse.

[1] Broom's Legal Maxims *877. [2] 2 M. & G. 729.

The court held that the plea was bad. The original contract being under seal, performance of it could not be dispensed with by an agreement not under seal.[1]

In America this doctrine has been somewhat modified, and a parol dispensation of performance is generally held to be a good defense to an action on a sealed instrument, if it is supported by a sufficient consideration, or has caused the breach for which the party who gave it seeks to recover.[2]

Contracts, at the common law, are of two kinds—contracts under seal, or specialties, and contracts not under seal, or simple contracts. No distinction is made between verbal and written contracts. A simple contract, therefore, may be discharged by a subsequent parol agreement, whether the original contract were reduced to writing, or consisted simply of spoken words. When, however, the original contract is required by the Statute of Frauds to be in writing, the better opinion is that it cannot be varied by a subsequent contract which is not in writing. As the new contract is rendered void by the Statute of Frauds, it ought not to affect the rights acquired under the former agreement.[3] There are cases, however, which decide the other way.[4] And

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[1] See also Thompson *v.* Brown, 7 Taunt. 656; Spence *v.* Healey, 8 Ex. 668; Cordwent *v.* Hunt, 8 Taunt. 596; Mayor of Berwick *v.* Oswald, 1 E. & B. 295; Woodruff *v.* Dobbins, 7 Blackford (Ind.) 582; Hogencamp *v.* Ackerman, 4 Zab. (N. J.) 133.

[2] U. S. *v.* Howell, 4 W. C. C. R. 620; Fleming *v.* Gilbert, 3 Johns. 528; Le Fevre *v.* Le Fevre, 4 S. & R. 241; Dearborn *v.* Cross, 7 Cowen 48; Canal Co. *v.* Ray, 101 U. S. 522; Esmond *v.* Van Benschoten, 12 Barb. 366; Notes to Cumber *v.* Wane, 1 Sm. L. C. (8th Am. ed.) 665, 666; 2 Am. L. C. (5th ed.) 590–594; see also Nash *v.* Armstrong, 10 C. B. N. S. 259.

[3] Goss *v.* Lord Nugent, 5 B. & Ad. 58; Noble *v.* Ward, L. R. 2 Ex. 135; Ogle *v.* Earl Vane, L. R. 2 Q. B. 275; s. c. 3 Id. 272; Hickman *v.* Haynes, L. R. 10 C. P. 598; Hasbrouck *v.* Tappen, 15 Johns. 200; Swain *v.* Seamans, 9 Wal. 272; Hill *v.* Blake, 97 N. Y. 216; Notes to Cumber *v.* Wane, 1 Sm. L. C. (8th Am. ed.) 669.

[4] Cummings *v.* Arnold, 3 Met. 486; Stearns *v.* Hall, 9 Cushing 31.

in England it would seem that a contract which is required by the statute to be in writing may be absolutely discharged by an oral agreement, although it cannot be varied without a writing.[1]

[1] Willes, J., in Noble *v.* Ward, L. R. 2 Ex. 135; Lord Denman, C. J., in Goss *v.* Lord Nugent, 5 B. & Ad. 58.

CHAPTER II.

PROVISIONS FOR DISCHARGE.

A contract may contain provisions which make it determinable under certain circumstances. This may be by the non-fulfilment of a specified term of the contract, by the occurrence of a particular event, or by the exercise by one party of an option to dissolve the contractual relation.

Section 1. Non-Fulfilment of a Specified Term.

The parties may introduce into their contract a provision, that if one of them fail to fulfil a certain specified term, the other shall be entitled to treat the agreement as at an end. The difference between this mode of discharge and that by breach is this: when the parties have agreed that one of them shall have an option to dissolve the contract if certain of its terms are not observed, upon the non-fulfilment of the specified terms the party may exercise his option, and if he elects to treat the contract as at an end it will be discharged. But when a term of the contract is broken, and there is no agreement that the breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract; for if it is not, the contract will not be discharged.

The case of Head *v.* Tattersall[1] furnishes an instance of a contract which contained a provision for its discharge. The plaintiff, on Monday, bought a horse of the defendant which was warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty, up to the Wednesday

[1] L. R. 7 Ex. 7.

evening following the sale, to return the horse if it did not answer to its description. While it was in his possession, though not through any default or neglect on his part, it met with an accident which depreciated its value. The horse did not answer to the description, and the plaintiff returned it before the Wednesday evening, and brought an action for the price which he had paid. Held, that he was entitled to recover. CLEASBY, B. said: "As a time for returning the horse was expressly fixed by the contract, an accident occurring within the time, from a cause beyond the plaintiff's control, ought not to deprive him of his right. * * * * * * The effect of the contract was to vest the property in the buyer, subject to a right of rescission in a particular event, when it would revest in the seller. I think, in such a case, that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value, caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is revested, and he must therefore bear the loss."[1]

SECTION 2. OCCURRENCE OF A PARTICULAR EVENT.

The parties may introduce a provision that the contract shall be discharged upon the performance of a condition, or the occurrence of a particular event. Thus, a bond generally contains a condition that if the obligor does some act the obligation shall be void. So, it is usual to insert in a charter-party a provision that the ship-owner shall be excused if the performance of the contract be prevented by the occurrence of certain specified events. In Geipel *v.* Smith,[2] the defendant en-

[1] See also Elphick *v.* Barnes, L. R. 5 C. P. D. 321.

[2] L. R. 7 Q. B. 404.

gaged to load his vessel with a cargo of coals at a spout, as directed by the plaintiff, and, having loaded, to proceed to Hamburg, and there deliver the coals. The charter-party excepted certain risks, one of which was "the restraints of princes and rulers." Before anything had been done by either party in furtherance of the contract, war broke out between France and Germany, and the port of Hamburg was declared to be blockaded. The defendant threw up the charter-party, and refused even to go to the spout and load his cargo. The plaintiff sued him for a breach of contract, claiming that he was bound to load his cargo, that part of the contract not coming within one of the excepted risks; but the court held that he could not recover. "It was an entire contract," said COCKBURN, C. J., "and there was an insuperable obstacle to the performance of it *in toto;* and the defendant was, therefore, justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it, was useless."

The contract of a common carrier furnishes another illustration. A common carrier is an insurer of the goods which he carries, and is responsible for any injury which they may sustain while they are in his possession. It is, however, an implied term in every contract with a carrier, that if a loss is caused "by the act of God, or the public enemy, or a defect inherent in the thing carried," the carrier shall be excused.

The term "act of God" has given rise to much discussion. It was carefully considered and received a judicial interpretation in the recent case of Nugent *v.* Smith.[1] The defendant, a common carrier by sea, received from the plaintiff a mare, to be carried from London to Aberdeen. In the course of the voyage the

[1] L. R. 1 C. P. D. 423.

ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the violent struggling of the mare herself, without any negligence on the part of the defendant's servants. The Court of Common Pleas held that the defendant was liable, and said that in order to constitute an act of God, "the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not, by any amount of ability, foresee would happen; or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect."[1] This ruling was reversed by the Court of Appeals. "All that can be required of the carrier," said COCKBURN, C. J., "is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers usually have recourse, he does all that can reasonably be required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable."[2]

A loss for which a carrier would not be held responsible, as being caused by an act of God, may, perhaps, be defined to be, such a loss as results from a natural cause

[1] L. R. 1 C. P. D. 34. [2] Id. 437, 438.

without the intervention of man, which could not have been prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ.[1]

Section 3. Exercise of an Option to Discharge.

A continuing contract may contain a provision which makes it determinable at the option of either party; and such a provision is sometimes incorporated into it by implication from known usage and custom. If one man employ another in the capacity of clerk, provided that each shall have a right to put an end to the relation at any time upon giving one month's notice to the other, the employment may be determined by complying with the express terms of the agreement. A contract for domestic service may be determined by the servant upon giving the customary notice, and by the master upon giving the customary notice, or paying the servant his wages for the length of time to which he is entitled to notice. The length of the notice is regulated by the custom of the place where the contract is made.[2] In England, the hiring of a servant without any engagement as to the duration of the service is construed to be a hiring for a year, determinable by a month's warning, or the payment of a month's wages.[3] Such an implication does not generally exist in America.

When the hiring is for no certain time, and the wages are not paid at fixed periods, the contract may be deter-

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[1] See Wharton on Contracts, § 308; 2 Pars. on Contracts *158; Clark *v.* Barnwell, 12 How. 280; Notes to Coggs *v.* Bernard, 1 Sm. L. C. (8th Am. ed.) 422–431.

[2] Parker *v.* Ibbetson, 4 C. B. N. S. 347; Add. on Contracts 438–9; Whart. on Contracts, § 718; Leake, 673.

[3] Nowlan *v.* Ablett, 2 C. M. & R. 54.

mined at the will of either party, without giving any notice. Thus in Coffin *v.* Landis,[1] the defendant employed the plaintiff to sell his lands. Nothing was said in regard to the time during which the agreement should continue. The defendant discharged the plaintiff without previous notice, and the court held that he was justified in doing so, as the agreement was determinable at the will of either party, without warning to the other.

[1] 46 Pa. St. 426.

CHAPTER III.

DISCHARGE OF CONTRACT BY PERFORMANCE.

When the terms of a contract have been fulfilled—when the acts which the parties have agreed to do have been performed on both sides—the object of the agreement has been attained, and the contract is discharged. In order that performance may work a discharge, both the parties must have done all that the contract required them to do. When one party has performed his part of an agreement he has freed himself from further liability, but the contract is not discharged until the other party also has performed his part of the agreement.

The performance of a contract should be a fair and reasonable performance of that which the parties intended should be done—not a performance which merely satisfies the letter of the agreement, but a substantial, *bona fide* compliance with its spirit. When and by whom a contract should be performed, and whether or no certain acts amount to a performance, are questions which can only be answered by referring to the agreement itself.

The consideration of the rules by which the meaning of a contract is to be determined, belongs properly to that branch of the subject which treats of the construction and interpretation of contracts. If there be a partial or total failure of performance, the contract is broken: whether or no the breach amounts to a discharge is a question which we shall consider under the head of discharge by breach.

There are, however, two aspects of performance which we shall consider; these are payment, and tender.

Payment.

When the obligation imposed by a contract consists in the payment of a sum of money, the payment of the amount is a performance, and consequently a discharge, of the contract. When the parties substitute the payment of a sum of money in lieu of something else, or change the time or mode of payment from that originally agreed upon, it amounts to a new agreement, which is discharged by a payment made in pursuance of its terms. So, when a contract has been broken the right of action which results from the breach may be discharged by an accord and satisfaction, which often consists of a money payment.

It is an old rule of the common law that the payment of a sum less than that which is due cannot operate as a satisfaction of the debt. If one man owes another one hundred dollars, and the creditor agrees to accept fifty dollars in satisfaction of his claim, and gives the debtor a receipt in full, he may immediately afterward sue him for the other fifty dollars. But if the creditor receives some collateral thing in satisfaction, it is a good discharge of the debt. The courts will not inquire into its value. Thus, a horse worth fifty dollars might be received in satisfaction of a debt of one thousand dollars, while a payment in cash of five hundred dollars would leave the debtor liable to a suit for the balance of the debt. The reason for this difference is, that money having a fixed value, a small sum cannot possibly be worth as much as a larger, whereas a collateral thing, for all that appears, may be worth as much as, or more than, the debt. It was accordingly held in the early cases, that a promissory note for a less amount than the debt could not be received in satisfaction. "If £5 be no satisfaction for £15, why is a simple contract to pay £5 a satis-

faction of another simple contract of three times the value?"[1] But this doctrine has been overruled by the modern cases, and it is now held that a promissory note may be a good satisfaction, although it be for a less amount than the debt.[2] If a promissory note may be a satisfaction for a sum greater than its face value, there seems to be no reason why a money payment should not have the same effect, for a promissory note cannot possibly be worth more than its face value in cash. It is probable that the old doctrine of the common law will sooner or later be abandoned, and a creditor who chooses to receive a partial payment in satisfaction of his demands be held to his agreement.[3]

When a creditor accepts a promissory note from his debtor, the question arises whether the note is an absolute extinguishment of the debt, or an extinguishment conditional upon its payment at maturity.

In England, and in most of the United States, in the absence of other evidence, the presumption is that a promissory note was intended as a conditional payment, so that if it be not paid at maturity payment of the debt may be enforced as if the note had not been given.[4] In Massachusetts, Maine, and Vermont the presumption is that it was intended as an absolute payment.[5] The difference, however, is only one of presumption, for it is universally conceded that if the

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[1] Cumber *v.* Wane, 1 Strange 426; s. c. 1 Sm. L. C. 633.

[2] Goddard *v.* O'Brien, L. R. 9 Q. B. D. 39; s. c. 21 Amer. L. Reg. N. S. 637; Mechanics' Bank *v.* Huston, 11 W. N. C. 389.

[3] See Goddard *v.* O'Brien L. R. 9 Q. B. D. 39.

[4] Sard *v.* Rhodes, 1 M. & W. 153; Sayer *v.* Wagstaff, 5 Beav. 423; Peter *v.* Beverly, 10 Pet. 532; Robinson *v.* Read, 9 B. & C. 455; Maillard *v.* Duke of Argyll, 6 Sc. N. R. 938; *In re* London, &c., Bank, 34 L. J. Ch. 418; Article on Payment in Something Else than Money, 11 Cent. L. J. 360; Morriss *v* Harveys, 75 Va. 726; Sayre *v.* King, 17 W. Va. 562; *In re* Parker, 11 Fed. Rep. 397.

[5] 2 Pars. on Conts. (7th ed.) *624, and notes.

creditor accepts the note in full satisfaction and discharge of the debt, his only remedy is upon the note. So, if the creditor is guilty of laches, and omits duly to present the bill or note, and to give notice of its dishonor if not paid, the instrument becomes money in his hands, as between him and the person from whom he received it.[1] So if the note were originally received as cash, as bank bills are usually received, the payment would be absolute.[2]

Tender.

As performance will discharge a contract, so in some cases will an attempt to perform, although actual performance be not accomplished. Thus, if a vendor tenders goods in pursuance of the terms of a contract, and satisfies all the requirements of the contract with respect to delivery and so forth, but the vendee refuses to accept them, the vendor may successfully maintain or defend an action for the breach of the contract.[3]

But when performance consists in the payment of money, a tender of payment does not discharge the contract, but rather establishes the liability of him who makes the tender, for, in general, he is liable to pay the sum which he tenders whenever he is called upon to do so. But it puts a stop to accruing damages or interest for delay in payment, and if an action be brought for the debt it entitles the defendant to costs.[4]

In order that a man may profit by his tender, he must from the time of making it continue ready and willing to carry it into effect. Consequently, if after having made a tender he refuses to pay his debt, he loses the benefit of his tender.

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[1] Peacock *v.* Pursell, 14 C. B. N. S. 728.

[2] Guardians of the Poor *v.* Greene, 1 H. & N. 889.

[3] Startup *v.* Macdonald, 6 M. & G. 593.

[4] Cornell *v.* Green, 10 S. & R. 14.

The tender must be an actual production of the money, and a proffer of it to the creditor. The entire sum due must be offered in such a form that the creditor may take the exact amount of his debt. The tender must be unconditional. A debtor has no right to annex any conditions to which the creditor has a right to object. For instance, he has no right to demand a receipt in full. But if he merely asks a receipt for the amount which he tenders, the tender will be good.[1]

[1] See article on The Requisites to a Valid Tender, 17 Amer. L. Reg. N. S. 745, where the cases are collected.

CHAPTER IV.

IMPOSSIBILITY.

A contract may be impossible of performance at the time when it is made; or it may become impossible by events happening subsequently to its formation.

A contract to do a thing which both the promisor and promisee know to be physically impossible of performance, imposes no obligation upon either party. No expectation is created in the breast of the promisee, and, therefore, no wrong is done him if the promise is not fulfilled. A promise to fly to the moon (we suppose an extreme case) could not be enforced, for as no reasonable man would make such a contract, the law would presume that the parties never meant to bind themselves—never meant to make a contract. It is not so much the impossibility of performance which renders the agreement invalid, as it is the absence of that true consent which is the life of every contract. "I think," said BRETT, J.,[1] "it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted." Accordingly, if a man should bind himself to do something which may be deemed to be within the range of possibility, but which has never yet been done, and is not even known to be possible, he would be responsible in damages if he failed to perform his agreement. A contract to construct a vessel which should be able to cross the Atlantic in five days, would very probably be

[1] In Clifford *v.* Watts, L. R. 5 C. P. 588.

valid at the present day, although such a thing has never yet been done; while one hundred years ago such a contract would have been thought absurd. "I am not prepared to say," said WILLES, J., in the case last cited, "that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defense that the thing was impossible." The domain of impossibility is being constantly narrowed by the increase of scientific knowledge.

A contract to do a thing which is legally impossible is void. Thus, where a servant agreed, in consideration of certain services to be rendered to himself, to discharge a debt due to his master, it was held that the agreement was void, because it was legally impossible for the servant to discharge a debt due to his master.[1] The doctrine that a contract to do a thing which is legally impossible is void, might be supported by this argument: the parties are presumed to know the law, and, therefore, if they make a contract which is legally impossible of performance, they make a contract to do that which they know cannot be performed, and such a contract, as we have seen, is not binding. This reasoning may perhaps be thought to be a little technical.

When a contract is made upon the supposition that a certain thing is in existence, and it turns out that the thing never was in existence, or had been destroyed at the time when the contract was made, the agreement is void as having been made under a mistake. The parties make no contract because the thing which they supposed to exist, and the existence of which was indispensable

[1] Harvy *v.* Gibbons, 2 Lev. 161; see also Faulkner *v.* Lowe, 2 Ex. 595.

to the making of their contract, had no existence.[1] Thus, where a cargo of corn was sold while on its way by sea to London, and it turned out that prior to the sale the cargo had been destroyed, it was held that the contract of sale was invalid. "It appears to me clearly," said LORD CRANWORTH, "that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought." No such thing existing, the contract was void.[2] So a covenantee was discharged from the performance of his covenant to dig one thousand tons of potter's clay yearly, upon the discovery that at the time of making the covenant there was not so much as one thousand tons of clay under the land.[3]

When the impossibility of performance is known to the promisor, but not known to the promisee, the former is liable in damages for a failure to perform. If a married man promises to marry a single woman who does not know that he is already married, he is liable for a breach of his promise.[4]

If the impossibility is known to the promisee, but not to the promisor, the former cannot sue the latter for a failure to perform.[5] Thus, if a man, under the belief that his wife is dead, promises to marry a woman who at the time knows that the man's wife is in fact alive, she could not sue him for a breach of his promise.

So far we have considered cases in which the impossibility existed at the time when the contract was made. We come now to cases of subsequent impossibility.

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[1] Gibson *v.* Pelkie, 37 Mich. 380; Franklin *v.* Long, 7 Gill & John 407; Strickland *v.* Turner, 7 Ex. 208.

[2] Couturier *v.* Hastie, 5 H. L. C. 673.

[3] Clifford *v.* Watts, L R. 5 C. P. 577.

[4] Wild *v.* Harris, 7 C. B. 999; Millward *v.* Littlewood, 5 Ex. 775.

[5] Leake on Cont. 692.

Parties must always be considered as contracting with reference to the law as it existed at the time of the contract. If performance of a contract becomes wholly or in part impossible by reason of a change in the law, the contract is to that extent discharged.[1] A recent English decision illustrates this rule. In Baily *v.* De Crespigny,[2] the defendant demised certain premises to the plaintiff, and covenanted that neither he nor his assigns would, during the term, permit any but ornamental buildings to be erected on a certain paddock fronting the demised premises. Subsequently a railroad company took the paddock, under powers given to them by an act of Parliament, and built a railway station upon it. In an action for breach of the covenant it was held, that the defendant was discharged from his covenant by the act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform.

When the impossibility created by the law is only temporary, the contract will be suspended, but will revive again when the impediment is removed. In one case a vessel was detained in port for two years by an embargo, yet the owners were held responsible for not performing their contract when the embargo was removed.[3]

When the performance of a contract, which was possible in its inception, becomes impossible, the question arises whether the promisor is liable in damages for his failure to perform. If the promisor undertakes absolutely to perform his part of the agreement or pay

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[1] Atkinson *v.* Ritchie, 10 East. 534; Mayor of Berwick *v.* Oswald, 3 E. & B. 665; Brown *v.* Mayor of London, 9 C. B. N. S. 726; s. c. in Ex. Ch., 13 Id. 828; Jones *v.* Judd, 4 N. Y. 412; Brick Presby. Ch. *v.* N. Y., 5 Cowen 538.

[2] L. R. 4 Q. B. 180.

[3] Hadley *v.* Clarke, 8 T. R. 259; Baylies *v.* Fettyplace, 7 Mass. 325.

damages, even though performance should become impossible by reason of a change of law or otherwise, there is no doubt that he would not be excused by a subsequent impossibility. If, on the other hand, the contract contains a provision that it shall be discharged upon performance becoming impossible, it is equally clear that a subsequent impossibility would excuse the promisor. The question, therefore, is one which depends upon the intention of the parties, to be determined by a fair construction of their contract.

The general rule is, that when a party has undertaken absolutely to do a thing, he is not excused from liability by the occurrence of events which render the performance of his promise impossible.[1] "We think it firmly established, both by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control."[2] Thus, where a charter-party required a ship to be loaded with the usual dispatch, it was held to be no answer to an action for delay in loading that a frost had stopped the navigation of the canal by which the cargo would have been brought to the ship in the ordinary course.[3] And an absolute contract to load a full cargo of guano at a certain island, was not discharged by there not being enough guano there to make a cargo.[4] So, where a contractor undertook to erect a bridge according to certain plans and specifications, he was not excused from per-

[1] School District *v.* Dauchy, 25 Conn. 535.

[2] Per Blackburn, J., in Ford *v.* Cotesworth, L. R. 4 Q. B. 134.

[3] Kearon *v.* Pearson, 7 H. & N. 386; Engster *v.* West, 35 La. An. 119.

[4] Hills *v.* Sughrue, 15 M. & W. 253; see also Thiis *v.* Byers, L. R. 1 Q. B. D. 244.

forming his contract, although he found that it was impossible to execute part of the work in the manner described in the plans.[1]

Where the duty or charge is imposed upon the party by the law, and not by his own contract, he will be excused from liability if performance of the duty becomes impossible without any default on his part.[2]

We have already seen that some contracts contain express or implied provisions, that if performance be rendered impossible by the occurrence of certain specified events, the contract shall be discharged. Now contracts, whose performance depends upon the continued existence of a specified thing, are discharged by the destruction of the thing from no default of either party. Taylor *v.* Caldwell[3] is a good illustration of this principle. In that case A agreed to give B the use of a music hall on certain specified days, for the purpose of holding concerts. Before the days for performance arrived the music hall was destroyed by fire. There was no clause in the contract providing for such a contingency. The court held that both parties were excused from performance of the contract. "Where, from the nature of the contract," said BLACKBURN, J., "it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any ex-

[1] Thorn *v.* Mayor of London, L. R. 9 Ex. 163; in Ex. Ch., L. R. 10 Ex. 112; Aff'd. in H. L., L. R. 1 App. Ca. 120; see also Jones *v.* St. John's College (Oxford), L. R. 6 Q. B. 115, 124.

[2] Paradine *v.* Jane, Aleyn 26; Phillips *v.* Stevens, 16 Mass. 238; 2 Story on Cont., § 1334.

[3] 3 B. & S. 826.

press or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Accordingly, a lessee who had covenanted to work certain coal mines, was held to be excused from further performance of his covenant upon the mines becoming exhausted.[1]

In like manner, a contract whose performance depends upon the personal capacity of the parties, is discharged by their death or incapacitating illness.[2] In Robinson *v.* Davison,[3] the defendant agreed to play the piano at a concert to be given by the plaintiff on a specified day. Upon the day in question she was unable to perform, on account of illness. The plaintiff sued her for breach of contract, but failed to recover. "This," said BRAMWELL, B., "is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must in my judgment be taken to have been conditional, and not absolute."[4]

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[1] Walker *v.* Tucker, 70 Ill. 527; Dewey *v.* School District, and note, 19 Amer. L. Reg. N. S. 550.

[2] Hall *v.* Wright, E. B. &. E. (96 E. C. L. R.) 793.

[3] L. R. 6 Ex. 269.

[4] See also Farrow *v.* Wilson, L. R. 4 C. P. 744; Scully *v.* Kirkpatrick, 79 Pa. St. 324; Allen *v.* Baker, 86 N. C. 91; Siler *v.* Gray, Id. 566.

If a party has an option to perform his contract in one or other of two modes, and one of those modes becomes impossible, he is bound to perform it in the other mode.[1]

When impossibility of performance is caused by the act of one of the parties, it is equivalent to a breach. We shall speak of this mode of discharge in treating of discharge by breach.

[1] Barkworth *v.* Young, 4 Drew. 25; Da Costa *v.* Davis, 1 B. & P. 242.

CHAPTER V.

DISCHARGE OF CONTRACT BY BREACH.

In the present chapter we shall first point out the different ways in which a contract may be broken, and then consider the consequences which result from a breach of contract.

Section 1. Forms of Breach.

A party to a contract may break it in one of three ways: (*a*) by renouncing his liabilities under it; (*b*) by rendering performance of his promise impossible; (*c*) by totally or partially failing to perform what he has undertaken.

(*a*) *Breach by renunciation.*

If before the time for performance of a contract has arrived one party announce to the other that he does not intend to perform his promise, the latter may treat the contract as broken, and bring an action immediately against the former for the breach. It is not necessary that he should postpone his suit until the time for performance has arrived.[1] It might be argued that a contract could not be broken before the time when performance is due, because until then the promisee would not be entitled to performance, and therefore could not be injured by a refusal to perform. But the contractual relation begins immediately upon the making of the contract, and not at the time fixed for performance. Each party has a right to have this relation continued until the contract has been performed. "It

[1] Halloway *v.* Griffith, 32 Iowa 409; Howard *v.* Daly, 61 N. Y. 362; Burtis *v.* Thompson, 42 Ibid. 246; Ætna Life Ins. Co. *v.* Nexsen, 84 Ind. 347; Grau *v.* McVicker, 8 Biss. C. Ct. 13; Nilson *v.* Morse, 52 Wis. 240; Zuck *v.* McClure, 98 Pa. St. 541; *contra* in Mass., Daniels *v.* Newton, 114 Mass. 530.

is true, * * *" said COCKBURN, C. J.,[1] "that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is * * * * * a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly."

The case of Hochster *v.* De la Tour[2] is a leading case, and a good illustration of this principle. The defendant, on the 12th of April, agreed to employ the plaintiff as a courier for three months, the employment to begin upon the 1st of June. On the 11th of May the defendant wrote to the plaintiff that he had changed his mind, and declined his services. The plaintiff brought an action for breach of the contract on the 22d of May. The defendant claimed that the action was prematurely brought, as the service was not to begin until the 1st of June. The court, however, held that the refusal of the defendant to perform amounted

[1] In Frost *v.* Knight, L. R. 7 Ex. 111, 114.

[2] 2 E. & B. 678.

to a breach and entitled the plaintiff to bring his action immediately. In the recent case of Frost *v.* Knight,[1] an action was brought for the breach of a promise of marriage. The promise was to marry the plaintiff on the death of the defendant's father. While the father was still living the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement; whereupon the plaintiff, without waiting for the father's death, at once brought her action; and it was held that she was entitled to recover.[2]

Sometimes the breach occurs after the contract has been partly performed, by a refusal to proceed with performance. Thus, in Cort *v.* Ambergate Railway Co.,[3] the plaintiffs agreed to supply the defendants with 3,900 tons of railway chairs, to be delivered in certain quantities at specified dates. After the plaintiffs had delivered 1,787 tons, according to the contract, the defendants desired them not to send any more, as they would not be wanted and would not be accepted. The plaintiffs then stopped making the chairs and sued the defendants on the contract; and the court held that they were entitled to recover.

In Massachusetts it is held that a renunciation of the contract before performance is due does not amount to a breach;[4] but that an absolute refusal to perform after the time for performance has arrived does amount to a breach, even when the contract is by its terms to continue in the future.[5]

The promisee is not bound to treat the renunciation as a breach. He may, if he pleases, treat it as inopera-

[1] L. R. 7 Ex. 111, *supra*.

[2] See opinion of Cockburn, C. J., in which the law upon this subject is very fully and clearly stated.

[3] 17 Q. B. 127.

[4] Daniels *v.* Newton, 114 Mass. 530.

[5] Parker *v.* Russell, 133 Mass. 74.

tive; but in that case he keeps the contract alive for the benefit of the other party, as well as his own. If the promisor withdraw the notice of his intention not to perform before the promisee has elected to treat it as a breach, the latter loses his right to treat the contract as broken, and the parties are in the same position that they would have been in if the notice had never been given.[1] So if the promisee declines to accept the refusal as a breach and insists that the contract shall continue in force, it enables the other party to take advantage of any supervening circumstances which would justify him in refusing to complete it. Thus in Avery *v.* Bowden,[2] the defendant agreed by charter-party to load a cargo on the plaintiff's ship at Odessa. After the ship arrived at Odessa the defendant's agent told the master that he had no cargo for the vessel, and that he had better go away; but the master refused to leave, and continued to demand a cargo. Before the ship's laying days had expired war was declared between Russia and Great Britain, and the vessel was obliged to sail from Odessa in ballast. The plaintiff afterward sued the defendant for a breach of the charter-party; but it was held that, as there had been no actual failure of performance before the war broke out (the days within which the defendant was entitled to load not having then expired), and as the renunciation had not been accepted as a breach by the plaintiff's agent, the defendant was entitled to the discharge of the contract which took place upon the declaration of war, and therefore the plaintiff could not recover.

(b) Impossibility created by one party.

As the renunciation of a contract before performance

[1] Frost *v.* Knight, L. R. 7 Ex. 112, 113, *supra;* Nilson *v.* Morse, 52 Wis. 240; Zuck *v.* McClure, 98 Pa. St 541; Howard *v.* Daly, 61 N. Y. 375.

[2] 5 E. & B. 714.

is due is equivalent to a breach and entitles the injured party to sue immediately, so if one party by his own act makes the performance of his promise impossible, the other may at once bring an action against him for a breach. Thus in Planché *v.* Colburn,[1] the defendants engaged the plaintiff to write a treatise on Costume and Ancient Armour, for publication in "The Juvenile Library." The plaintiff commenced the work, but before he had completed it the defendants abandoned the publication; and the court held that the plaintiff might treat the contract as broken and bring an action immediately.[2] And in another case a person agreed to act as the agent of an insurance company for five years. Before the five years were expired the company was wound up voluntarily; and it was held that the agent might sue the company at once and recover his salary for the five years.[3] So where a man promised to marry a woman on a future day and before the day married another woman; it was held that he was instantly liable to an action for breach of his promise.[4] And where a man contracted to execute a lease on a future day for a certain term and before the day executed a lease to another for the same term; it was held that he might be sued at once for breaking the contract.[5] And again, where a man contracted to sell and deliver specific goods on a future day, and before the day sold and delivered them to another, he was immediately liable to an action at the suit of the person with whom he had first contracted.[6]

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[1] 8 Bing. 14.

[2] See also Shaffner *v.* Killian, 7 Ill. Ap. 620.

[3] *Ex parte* Maclure, L. R. 5 Ch. Ap. 737; see also Seipel *v.* Ins. Co, 84 Pa. St. 47; Lovell *v.* Ins. Co., 111 U S. 264.

[4] Short *v.* Stone, 8 Q. B. 358; Sheahan *v.* Barry, 27 Mich. 218.

[5] Ford *v.* Tiley, 6 B. & C. 325.

[6] Bowdell *v.* Parsons, 10 East 359; Crist *v.* Armour, 34 Barb. 378; Raymond *v.* Minton, L. R. 1 Ex. 244.

In all of these cases the promisor, by his own act, put it out of his power to fulfil his promise, although in several of them at least he might have been able to perform when the time for performance arrived. Now, when a man makes the performance of his promise impossible it would seem to be equivalent to giving notice to the other party that he does not intend to abide by his contract, and this, as we have seen, amounts to a breach. But a notice of intention not to perform may be withdrawn at any time before it has been accepted or acted upon by the other party. Consequently, if rendering performance impossible be analogous to signifying an intention not to perform, it would follow that if performance should become possible before the promisee elected to treat the contract as broken, he would lose his option, and the contract would continue in force. Thus, in the case where a man contracted to sell and deliver certain goods on a future day and before the day sold them to another, if the vendor had recovered the goods before the vendee had treated the contract as broken, and was ready and able to deliver them according to the contract, the vendee would not have been justified in refusing to accept them. If, however, something had happened to the goods in the meantime, so that, although the vendor could deliver them to the vendee, he could not deliver them in the same condition that they were in at the time when the sale was made, the impossibility of performance would continue and the contract would be broken. So, in the case where a man promised to marry a woman upon the death of his father and married another woman while his father was alive, although if his wife had died before his father he would have been able to marry the woman to whom he was first engaged, nevertheless she might very reasonably have claimed

that a promise to marry must, in the nature of things, stand upon a different footing from an ordinary contract, and that by marrying another woman, when he was engaged to her, he had committed a breach which could never be healed.

We cannot say that the courts would take this view of the matter and treat an impossibility created by one party as analogous to a notice of an intention not to perform, as we know of no case in which the question has arisen.

(c) *Breach by non-performance.*

It is obvious that a contract will be broken if either party fail to perform any of its terms. If A agrees to build a house for B and does not build it according to his agreement, he breaks his contract. We need not dwell upon this mode of breach at present.

Section 2. Effects of a Breach.

Having shown the different ways in which a contract may be broken, we shall now proceed to consider the effects of a breach.

If a contract be broken, wholly or in part, he who caused the breach becomes liable to an action for damages at the suit of him whom he has injured. But although a breach always entitles the party injured to a right of action against the other party, it does not always discharge him from the further performance of his part of the contract. Whether or no a breach operates as a discharge depends upon the character of the contract, and the nature of the breach. If the promise of one party be absolute, and not conditional upon performance of his promise by the other party, a breach by the latter will entitle the former to a right of action, but will not discharge him from the performance of his promise. If the promise of one party be conditional

upon performance by the other party, a breach by the latter in a matter which is vital to the existence of the contract will work a discharge. But if the breach be in a matter of minor importance, which may be compensated for in damages, a right of action will arise, but the parties will be bound to proceed with the performance of their contract as if the breach had not occurred. We shall consider the effects of a breach, first of absolute promises, and then of conditional promises.

(*a*) *Absolute promises.*

If a man undertake absolutely to perform his part of a contract, and do not make the performance of his promise conditional upon performance by the other party, a breach by the latter will entitle the former to bring an action for damages, but will not discharge him from the performance of his promise. When the promises of both parties are absolute and independent of each other, upon a breach of his promise by one party the other may sue him without averring that he has performed his own promise, and, of course, it is no defense to such an action for the defendant to plead that the plaintiff has failed to perform his part of the agreement. This may be illustrated by the old case of Ware *v.* Chappel,[1] decided in 1649. "Ware brought an action of debt for £500 against Chappel upon an indenture of covenants between them, viz.: that Ware should raise five hundred soldiers and bring them to such a port, and that Chappel should find shipping and victuals for them to transport them to Gallicia; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time, and to this plea the plaintiff demurs. ROLL, C. J., held: that

[1] Style's Rep. 186.

there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them; and it is not necessary to give notice of the number of men raised, for the number is known to be five hundred; and the time for the shipping to be ready is also known by the covenants; and you have your remedy against him if he raise not the men as he hath against you for not providing the shipping."

"What is the reason," said HOLT, C. J.,[1] "that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that A shall have the horse of B, and A agree that B shall have his money, they may make it so; and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be then averred; as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse."[2]

These cases illustrate the character of absolute promises. The consequences which result from their breach are the same to-day as they were when these cases were decided. It must, however, be borne in mind that the rules for determining whether promises are absolute or not have changed very much since the seventeenth century, and that promises which would formerly have been held to be absolute would not be so construed at

[1] In Thorp *v.* Thorp, 12 Mod. 455, 464.

[2] See Long *v.* Caffrey, 93 Pa. St. 526; Hard *v.* Seeley, 47 Barb. 428.

the present day. In ancient times questions of this kind were decided upon a subtle and technical construction of the words of a contract, and very little regard was paid to the evident sense and intention of the parties. Thus it was said by FINEUX, C. J.:[1] "If I covenant with a man that I will marry his daughter, and he covenants with me that he will convey an estate to me and his daughter and the heirs of our two bodies begotten, if I afterward marry another woman, or his daughter another man, still I shall have an action of covenant against him to compel him to convey the estate: but, if the covenant were, that he should convey an estate to us two *for the cause aforesaid*, then no action would lie until we were married."[2] At the present day the question is determined "by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case;"[3] and when each party's promise forms the whole consideration for the promise of the other, in the absence of very decided indications to the contrary, the promises will not be held to be independent of one another.[4]

The rules for determining whether or not promises are absolute are rules of construction. We shall not consider them here, as they do not properly belong to our branch of the subject.

(*b*) *Conditional promises.*

We have seen that if the promise of one party be absolute and independent of the promise of the other party, a breach by the latter will entitle the former to a right of action, but will not discharge him from the

[1] In 15 H. vii, 10, pl. 17.

[2] See notes to Pordage *v.* Cole, 1 Wms. Saund. 319.

[3] Tindal, C. J., in Stavers *v.* Curling, 3 Bing. N. C. 368.

[4] Morton *v.* Lamb, 7 T. R. 130; 2 Pars. on Cont. *529 n.

performance of his promise. We come now to the consideration of conditional promises. The contract may contain a term providing for a discharge upon the occurrence of a certain event; the performance of his promise by one party may be upon condition that the other party also perform his promise at the same time; or one party may make the performance of his promise conditional upon a prior performance by the other party. Conditions, therefore, as regards the time when they are to be performed, are either *subsequent, concurrent,* or *precedent.* We shall consider the consequences of a breach of each one of these conditions in its order.

(1) *Conditions subsequent.*

A contract may contain a provision that, upon the doing of some act or the happening of some event, the relation of the parties shall come to an end. Thus in the contract of a carrier there is always an express or implied condition that if the carrier be prevented by the act of God from performing his promise he shall be discharged from liability. As we have already dealt with conditions subsequent in speaking of those contracts which contain provisions for their own discharge, they need not detain us longer here.

(2) *Conditions concurrent.*

When we speak of concurrent conditions we mean that each party is to perform his promise at the same time with the other. In point of fact it might be necessary that one should perform before the other, and therefore the conditions might be termed precedent. But although both promises cannot be performed simultaneously, nevertheless each party must be ready and willing to perform at the time appointed. If, therefore, one party fail to perform at the time, the other is discharged from the performance of his promise. But

he cannot sue the party by whom the contract was broken unless he has performed, or was ready and willing to perform, his own part of the agreement. In bringing an action for the breach of a concurrent condition the plaintiff must always aver that he has performed, or was ready and willing to perform, his own promise. A very common example of this kind of condition occurs in the sale of goods. "The general rule in executory agreements for the sale of goods is that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions, in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance, or offer to perform, or averring readiness and willingness to perform his own promise."[1] In Morton *v.* Lamb,[2] the plaintiff sued the defendant for not delivering some corn in pursuance of an agreement that the defendant should deliver the corn at a certain place within one month from the time of the sale. The plaintiff averred that he was ready and willing to receive the corn, but that the defendant did not deliver it. At the trial the plaintiff recovered a verdict. The defendant then moved that the judgment should be arrested, because it was not averred that the plaintiff had tendered to him the price of the corn, or was ready to have paid for it on delivery. The court sustained the motion. "Both things," said Lord Kenyon, C. J., "the delivery of the corn by one and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it."[3]

[1] Benj. on Sales, § 592. [2] 7 T. R. 125.

[3] See Gazley *v.* Price, 16 John. 267; Swan *v.* Drury, 22 Pick. 485; Benj. on Sales, § 592, where many cases are collected in the notes.

(3) *Conditions precedent.*

The term "condition precedent" is commonly used in a restricted sense, as meaning "a statement or promise, the untruth or non-performance of which discharges the contract."[1] But we shall use it here in a broader sense, as including all those acts which by the contract one party is to perform before the performance of the other party is due. It will be observed that every breach of a condition precedent in the narrower sense of the term will discharge the contract, whereas if the words be given a more general meaning the question of discharge will depend upon the character of the breach.

If one party make the performance of his promise conditional upon a prior performance by the other party, the latter cannot sue the former for a breach of contract without averring that he has performed his part, or was ready and willing to perform it but was prevented by the act of the promisee.[2] And if the party who is to perform his promise first wholly fail to perform, the other is discharged. There is no doubt that in every case where the performance of the promise of one party is to precede the performance of the other party, a total failure by the former to perform his promise will discharge the latter. But when the breach is only partial it is somewhat more difficult to determine whether or not the promisee is discharged.

If the breach be in a matter which upon a fair and reasonable construction of the contract the parties may be deemed to have considered as vital to its existence, or which they have expressly stated shall be vital, it will discharge the promisee from the performance of his promise. In the absence of an express stipulation a term is considered of vital importance when it goes to

[1] Anson, *294. [2] People v. Glann, 70 Ill. 232.

the root of the matter, so that a breach of it would frustrate the main object of the contract. For example, in Poussard *v.* Spiers,[1] it was held that the failure of a singer, who was to take the principal female part in a new opera, to perform in the opening and early performances, went to the root of the matter and discharged the other party.[2]

If the parties expressly state that the non-performance of a certain term shall be vital to the existence of their contract, a breach of that term will work a discharge. "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent,[3] it will be one; or they may think the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently express such an intention, it will not be a condition precedent."[4]

Sometimes the promise of one party is conditional upon the entire performance of his part of the contract by the other party. When this appears to be the intention of the parties the promisor must perform the whole of his part of the contract before he can recover anything from the other party, and a partial breach will discharge the promisee from the performance of his promise. The leading case upon this point is that of Cutter *v.* Powell.[5] In that case the defendant, being at Jamaica, delivered to T. Cutter, the intestate, the fol-

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[1] L. R. 1 Q. B. D. 410.

[2] And see Spalding *v.* Rosa, 71 N. Y. 40.

[3] The term is here used in the restricted sense.

[4] Blackburn, J., in Bettini *v.* Gye, L. R. 1 Q. B. D. 187, *infra*.

[5] 6 T. R. 320; s. c. 2 Sm. L. C. *1.

lowing note: "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, *provided he proceeds, continues, and does his duty* as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The sum agreed to be paid was larger than the usual wages of a second mate. The ship sailed on the 2d of August, and arrived in Liverpool on the 9th of October. Cutter did his duty as second mate until the 20th of September, when he died. It was held that the intestate's representatives could not recover, either on the express contract or on a *quantum meruit*. "The agreement is conclusive," said GROSE, J.; "the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was the contract between the parties. * * * It may fairly be considered that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage."[1]

If, however, the promisee accepts a partial performance of an entire contract, he may in some cases be sued by the promisor upon an implied contract to pay as much as that which he has received is reasonably worth.[2]

It must be borne in mind that if the party whose performance is a condition precedent be prevented from per-

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[1] See also Harris *v.* Ligget, 1 W. & S. 301; Martin *v.* Shoenberger, 8 Id. 367; Hartley *v.* Decker, 89 Pa. St. 470; Behn *v.* Burness, 3 B. & S. (113 E. C. L. R.) 751, and n.; Leonard *v.* Dyer, 26 Conn. 177.

[2] See 2 Pars. on Conts. *523 n. (*i*); and notes to Cutter *v.* Powell, 2 Sm. L. C. (8th Am. ed.) *1.

forming his promise by the act of the other party, he will be discharged from further performance, and may recover damages on a *quantum meruit* or in an action on the contract if he prove that he was ready and willing to perform his promise but was prevented from doing so by the act of the defendant.[1]

When the breach is in a matter which the parties may be deemed to have considered of minor importance, which may be compensated for in damages, the party injured is not discharged from the further performance of his contract. He is bound to proceed with performance as if the breach had not occurred, and seek his remedy in an action for damages for whatever injury he has suffered. We may illustrate this principle by a few cases. In Bettini *v.* Gye,[2] the plaintiff, a singer, agreed with the director of the Royal Italian Opera that he would undertake the part of first tenor in the theatres, halls, and drawing-rooms in the United Kingdom. The agreement was in writing and contained this clause: "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals." The plaintiff broke this clause by failing to arrive in London until two days before the opera began. The defendant refused to proceed with the engagement, claiming that the breach discharged him from the further performance of the contract. The plaintiff then sued him for a breach of contract. In delivering the judgment of the court, BLACKBURN, J., said: "We think that we are to look to the whole contract and * * * * see whether the

[1] Planché *v.* Colburn, 8 Bing. 14; Goodman *v.* Pocock, 15 Q. B. 576; Cort *v.* Ambergate Railway Co., 17 Q. B. 127; Hall *v.* Rupley, 10 Pa. St. 231; Moulton *v.* Trask, 9 Met. 577; Hoagland *v.* Moore, 2 Blackf. (Ind.) 167; Woolner *v.* Hill, 93 N. Y. 576; United States *v.* Behan, 110 U. S. 339.

[2] L. R. 1 Q. B. D. 183.

particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages." As the court were of opinion that the stipulation did not go to the root of the matter, the defendant was held to be liable for the breach of contract, and the plaintiff recovered.

In MacAndrew *v.* Chapple,[1] an action was brought against a freighter for not loading a cargo. The charter-party contained a clause that the ship should "with all convenient speed * * * proceed to Alexandria * * * and there load a cargo of cotton." The ship deviated from her course and arrived at Alexandria a few days later than she would have done if she had gone there direct. The ship had not been taken up for any particular cargo, and a small loss in freight was the only result of the delay. The court held that the delay afforded no justification to the freighter for refusing to load a cargo, but that his remedy for any damage that had accrued by reason of the delay was by a cross action. "It seems to be now settled," said WILLES, J., "* * * that a delay or deviation which * * * goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter." In other words, the breach of a clause which on its face does not go to the root of the matter will nevertheless discharge the contract if it appear that in fact it frustrated the object of the parties.

[1] L. R. 1 C. P. 643.

It must be borne in mind that if the parties considered one clause as vital, a breach of that clause will discharge the contract, even though it be in a matter which, but for the express stipulation, the courts would deem of minor importance. It was on this ground that the case of Lowber *v.* Bangs,[1] was decided. In that case a vessel named the Mary Bangs, while on a voyage to Melbourne, was chartered at Boston for a voyage from Calcutta to the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." Before the master was advised of this engagement the vessel had sailed to Manilla, which is much out of the direct course from Melbourne to Calcutta. She arrived at Calcutta more than three months after the time at which she ought to have arrived if she had gone there directly from Melbourne. Freights in the meantime had largely fallen. After the arrival of the Mary Bangs the charterers engaged another vessel, which they loaded with the cargo intended for the Mary Bangs. The case thus showed that the object of the voyage had not been frustrated. In a suit to recover damages for a breach of the charter-party, the court below held that the charterers were not justified in repudiating the contract. This ruling was reversed by the Supreme Court of the United States, which held, that the parties, when they made their contract, intended that the clause "to proceed with all possible despatch" should be a condition precedent to any liability of the charterer, and that as the plaintiff had broken that clause he was not entitled to recover.[2] And in a very recent case, where the contract was for the sale of five hundred tons of No. 1

[1] 2 Wall. 728.

[2] See also Davison *v.* Von Lingen, 113 U. S. 40; Glaholm *v.* Hays, 2 M. & G. 257.

pig iron, "shipment from Glasgow," it was held that the buyer was justified in refusing to accept such iron shipped from Leith. "The term 'shipment from Glasgow,'" said GRAY, J., "defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer." The court also said that in a commercial contract a statement descriptive of the subject-matter was ordinarily to be regarded as a warranty or condition precedent upon the failure or non-performance of which the party aggrieved might repudiate the whole contract.[1] In such contracts, therefore, every term is regarded as important, and if one party fail to perform his promise in strict accordance with the agreement, the other is discharged.

Another example of a condition which does not go to the root of a contract is a warranty upon an executed sale of goods. "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it."[2] Upon the breach of a warranty the vendee may sue the vendor for damages, but cannot return the goods. If a man sell a horse to another and warrant that he is sound, the purchaser, having accepted the horse, cannot return him upon discovering that he is not sound, unless there be an express condition in the contract which gives him that privilege. His only remedy is an action for damages for the breach of the warranty.[3] Or, if he have not paid the price, he may wait until he is sued for the purchase-money, and then take advantage of the

[1] Filley *v.* Pope, S. C. U. S., No. 21, Oct. Term, 1885, not yet reported.

[2] Lord Abinger C. B., in Chanter *v.* Hopkins, 4 M. & W. 404.

[3] Kase *v.* John, 10 Watts 109; note to Chandelor *v.* Lopus, 1 Sm. L. C. (8th Am. ed.) 353.

breach as a proof of failure of consideration and in mitigation of damages.[1]

We have seen that the breach of a term which of itself is not vital to the contract will nevertheless operate as a discharge if it wholly frustrate the object of the contract. It is also true that the breach of a term which in the first instance would have justified a party in repudiating the contract, cannot be taken advantage of as a discharge if the party have received a substantial performance of the contract. Thus in Carter *v.* Scargill,[2] the plaintiff, who was the publisher of a newspaper, sold out his business and plant to the defendant, and, in the event of the business being proved to realize a clear profit of £7 per week, the defendant agreed to pay to the plaintiff in several installments the sum of £400. The defendant entered into possession of the business and afterward sold it. The plaintiff brought an action for the installments, and the defendant set up as a defense that the business was not proved to be worth £7 clear profit per week. The court held that, assuming that this would have been a good defense if the contract had remained executory, yet the defendant, having had a substantial part of the consideration, could not now take advantage of it.[3] In the leading case of Boone *v.* Eyre,[4] the plaintiff covenanted to convey to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 per annum for his life. The breach assigned was the non-payment of

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[1] 1 Sm. L. C. (8th Am. ed.) 343.

[2] L. R. 10 Q. B. 564.

[3] See also observations of Williams, J., in Behn *v.* Burness, 3 B. & S. (113 E. C. L. R.) 755; and of Parke, B., in Graves *v.* Legg, 9 Ex. 716–17.

[4] 1 H. Blk. 273 n.

the annuity. The defendant pleaded, that the plaintiff was not at the time of the deed legally possessed of the negroes on the plantation, and so had not a good title to convey. The court held that the plea was bad, LORD MANSFIELD observing that if the plea were to be allowed any one negro not being the property of the plaintiff would bar the action.[1]

In order, however, that the right to treat a contract as discharged should be turned into a mere right to bring an action for damages, it is necessary that the promisee should have received a substantial part of the consideration. If that which remains to be done by the promisor goes to the root of the contract, the promisee may rescind the contract, although he have received a partial performance. The case of Ellen *v.* Topp[2] furnishes us with an illustration of this principle. There, a master undertook to teach his apprentice the three trades of auctioneer, appraiser, and corn factor. The apprentice was to serve for five years. After three years were expired the master abandoned the trade of corn factor. The apprentice then absented himself from his master's service. The master sued on the indenture of apprenticeship for the desertion of the apprentice, and claimed that although the undertaking to teach the trade of corn factor might have been a condition precedent in the beginning, yet as the apprentice had received the benefit of three years' instruction, he had received a substantial part of the consideration, and was, therefore, put to his cross action for damages. But the court held that he could not recover. "The construction of an instrument," said POLLOCK, C. B., "may be varied by matter *ex post facto;* and that which is a condition precedent when the deed is executed may

[1] See Pust *v.* Dowie, 32 L. J. Q. B. 179; 2 Pars. on Conts. *530 and n.

[2] 6 Ex. 424.

cease to be so by the subsequent conduct of the covenantee in accepting less." Then, referring to Boone *v.* Eyre,[1] he went on to say: "The defendant * * * might have objected to the transfer, if the plaintiff had no good title to the negroes and refused to pay. * * * But this is no objection to the soundness of the rule, which has been much acted upon. * * * It cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue *must be the substantial part of the contract;* and if, in the case of Boone *v.* Eyre, two or three negroes had been accepted and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it. * * * To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn factor, so as to say that one is more the substantial part of the contract than another."

When a contract is severable, that is, "when the part to be performed by one party consists of several distinct and independent items, and the price to be paid by the other is apportioned to each item,"[2] upon a breach by one party of any one item, the question arises whether the other party is justified in repudiating the whole contract, or is bound to proceed with performance and seek his remedy in an action for damages for whatever injury he may have sustained by the breach. The parties may, of course, insert a provision in their contract that if either of them fail in the performance of any one part, the other may treat

[1] 1 H. Blk. 273 n.

[2] Pars. on Conts. *517.

the contract as at an end. It is only in the absence of such an express provision that the question we are now considering can arise.

The rule in England, as established by the recent cases, is, that a breach of any part of a severable contract will entitle the injured party to a right of action, but will not discharge him from the performance of the remainder of the contract, unless it be equivalent to a refusal to perform the balance of the contract, or be of such a character as to wholly frustrate its object. This rule may be illustrated by one or two cases. In Simpson *v.* Crippin,[1] the defendants agreed to supply the plaintiffs with from six to eight thousand tons of coal, to be delivered into the plaintiffs' wagons at the defendants' collieries in equal monthly quantities during the period of twelve months. During the first month the plaintiffs sent wagons to receive only one hundred and fifty-eight tons. Immediately after the first month had expired, the defendants informed the plaintiffs that they should treat the contract as at an end. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal. The court held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month, did not entitle the defendants to rescind the contract.

In Freeth *v.* Burr,[2] the defendant contracted to sell to the plaintiffs two hundred and fifty tons of pig iron, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel. The delivery of the first one hundred and twenty-five tons was not completed for nearly six months. The plaintiffs refused to pay for this, claiming a right to set off the loss they had sustained from

[1] L. R. 8 Q. B. 14 (1872). [2] L. R. 9 C. P. 208 (1874).

being obliged to procure other iron in consequence of the defendants' default, but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach of the contract by the plaintiffs, declined to deliver any more iron. Held, that the mere refusal to pay for the first parcel did not warrant the defendant in treating the contract as abandoned, and that the plaintiffs were entitled to damages for the breach. "In cases of this sort," said LORD COLERIDGE, C. J.,[1] "where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. * * * * * Where, by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract." This is the English rule.[2]

The Supreme Court of the United States have refused to follow the English cases. The question arose, and was thoroughly discussed, in the recent case of Norrington *v.* Wright.[3] In that case the contract was for the sale of five thousand tons of old T iron rails, to be shipped at the rate of about one thousand

[1] At pp. 213, 214.

[2] See on this subject Hoare *v.* Rennie, 5 H. & N. 19 (1859); Jonassohn *v* Young, 4 B. & S. 296 (1863); Simpson *v.* Crippin, L. R. 8 Q. B. 14 (1872), *supra;* Roper *v.* Johnson, L. R. 8 C. P. 167 (1873); *Ex. parte* Chalmers, L. R. 8 Ch. 289 (1873); Freeth *v.* Burr, L. R. 9 C. P. 208 (1874), *supra;* Bloomer *v.* Bernstein, Id. 588 (1874); Morgan *v.* Bain, L. R. 10 C. P. 15 (1874); Brandt *v.* Lawrence, L. R. 1 Q. B. D. 344 (1876); Reuter *v.* Sala, L. R. 4 C. P. D. 239 (1879); Honck *v.* Muller, L. R. 7 Q. B. D. 103 (1881); and Mersey Steel Co. *v.* Naylor, L. R. 9 Q. B. D. 648 (1882); Aff'd. in H. L., L. R. 9 App. Cas. 434 (1884), where the rule, as stated by Lord Coleridge, in Freeth *v.* Burr (*supra*), is quoted with approval by Earl Selborne, L. C., at p 438.

[3] 21 Amer. L. Reg. N. S. 395; Aff'd. by S. C. of U. S., No. 13, Oct. Term, 1885, 42 Legal Int (Philada.) 466.

tons per month, beginning in February, 1880—the whole to be shipped before August of the same year. Four hundred tons were shipped in February, and eight hundred and eighty-five tons in March. In April the shipments exceeded one thousand tons, and in the succeeding months fell short of that amount. The February shipment was delivered and paid for, but the buyers (the defendants) upon learning the amounts shipped in February, March, and April, declined to accept further shipments. The plaintiffs then brought an action against them for their refusal to accept the balance of the iron in compliance with the contract. The court below held that they could not recover, but said that they regarded the point as involved in serious doubt, and hoped that the case might be carried to the Supreme Court of the United States. Upon an appeal to the Supreme Court the judgment was affirmed. "The plaintiff," said GRAY, J., in delivering the opinion of the court, "instead of shipping about one thousand tons in February and about one thousand tons in March, as stipulated in the contract, shipped only four hundred tons in February, and eight hundred and eighty-five tons in March. His failure to fulfil the contract on his part in respect to these first two installments, justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

This case may be taken as settling the law upon this subject in the United States courts. Previously to this decision many of the State courts had followed the English rule.[1]

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[1] See article on the Rescission of Divisible Contracts, 15 Amer. Law Rev. 623; and Mr. Landreth's note to the case of Norrington *v.* Wright, 21 Am. Law Reg. N. S. 398–408, where the cases, both English and American, are collected and reviewed.

Section 3. Discharge of Right of Action.

Before leaving the subject of discharge of contract by breach, it is proper to notice briefly the different ways in which the right of action which arises upon a breach of contract may be discharged.[1]

A right of action may be discharged: (1) by the act of the parties; (2) by the judgment of a court; (3) by lapse of time.

(1) Act of Parties.

(*a*) *Release.*

In order that a release should be binding it must be under seal; otherwise, it would be a mere promise, without consideration, to refrain from the exercise of a right. Bills of exchange and promissory notes, it will be remembered, are in England excepted from the operation of this rule.[2]

(*b*) *Accord and satisfaction.*

An accord and satisfaction is an arrangement by which a creditor agrees to accept some new thing in satisfaction of his claim, and does actually accept the thing. If the agreement be not executed, it cannot be pleaded as an accord and satisfaction. The creditor may accept a new promise of the debtor in satisfaction of his claim, and if it be proved that it was agreed that the new promise should be a satisfaction of the debt it will be a good accord and satisfaction.[3] Thus in Mechanics' Bank *v.* Huston,[4] a debtor offered to give to his creditor his notes for two-thirds of the amount due, in full settlement and satisfaction. The creditor

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[1] See Sm. on Conts. *500-503.

[2] Byles on Bills *199; see *ante*, p. 3.

[3] Morehouse *v.* Second National Bank, 98 N. Y. 503.

[4] 11 W. N. C. 389.

accepted the notes in satisfaction, and it was held to be a valid discharge of the debt.[1]

(c) *Arbitration and award.*

The parties may agree to submit their dispute to arbitrators, in which case they will be bound by the award, unless there be some reason for setting it aside, as, for example, that it was procured by fraud or other undue means.

(2) JUDGMENT OF A COURT.

If a suit be brought for the breach of a contract, and judgment be recovered, the right of action becomes merged in the judgment, and all further proceedings must be founded upon the judgment, and not upon the contract.

(3) LAPSE OF TIME.

In most if not all of the States there are statutes which compel parties to bring their suits within a certain time after the cause of action accrues. If the suit be not brought within the prescribed time the right of action is extinguished.[2]

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[1] Notes to Cumber *v.* Wane, 1 Sm. L. C. (8th Am. ed.) 644–6; 2 Pars. on Conts. *681.

[2] See Sm. on Conts. *504 *et seq.*

CHAPTER VI.

DISCHARGE OF CONTRACT BY OPERATION OF LAW.

A contract is discharged under certain circumstances by the operation of rules of law, without regard to the intention of the parties.

Merger.

The acceptance of a higher security for the payment of a debt is an extinguishment of a lower security for the same debt. If the holder of a promissory note accepts a bond from his debtor for the payment of his debt, the note is extinguished. This result follows as a matter of law from the acceptance of the higher security. But if it be proved that the bond was given as a collateral security, the simple contract will not be discharged. In order to discharge an existing security by merger the new security must be of a higher nature than the old, the debt or other contract must be the same, and the parties to the securities must be identical.[1]

Alteration of a Written Instrument.

If a written instrument be altered in a material particular it is thereby discharged. An alteration which only does what the law would do—that is, only expresses what the law implies—is not a material alteration.[2]

It may be laid down as a general rule that a man is discharged from liability "if the altered instrument, supposing it to be genuine, would operate differently

[1] See Sm. on Conts. 29, 30, and notes.

[2] 2 Pars. on Conts. *720.

from the original instrument, whether the alteration be or be not to his prejudice."[1]

It was formerly held that an alteration by a mere stranger would discharge an instrument.[2] But it is now held that a spoliation by a stranger, or an accidental alteration through mistake, will not affect the validity of the instrument.[3] Thus, where the seal was torn off a deed by a stranger the instrument was not avoided.[4] And where the indorsements on a bill of exchange were canceled under a mistake by running a pen through them, it was held not to affect the rights of the parties.[5]

If an instrument is altered by the consent and agreement of the parties it amounts to a new contract.[6]

If an instrument be lost or accidentally destroyed, the rights of the parties remain unchanged, but are rendered more difficult of proof. In an action on a negotiable instrument alleged to be lost the defendant may demand an indemnity against possible claims.[7]

Appointment of Debtor Executor.

At the common law if a creditor appointed his debtor his executor, the debt was thereby extinguished.[8] But at the present day a debtor who has been appointed executor of his creditor is considered as a trustee for creditors and legatees of the amount of the debt.[9]

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[1] Per Lord Campbell, in Gardner *v.* Walsh, 5 E. & B. (85 E. C. L. R.) 89.

[2] Pigot's Case, 11 Rep. 27.

[3] Neff *v.* Horner, 63 Pa. St. 327; United States *v.* Spalding, 2 Mason 478.

[4] Rees *v.* Overbaugh, 6 Cowen 746.

[5] Wilkinson *v.* Johnson, 3 B. & C. 428; Raper *v.* Birkbeck, 15 East 17; and see 2 Pars. on Conts. *716, *et seq.*; Byles on Bills, *323, and notes; 1 Greenleaf on Ev. §§ 564–568.

[6] Myers *v.* Nell, 84 Pa. St. 369.

[7] See Byles on Bills (7th Am. ed.) *381 *et seq.* and notes.

[8] Co. Litt. 264 b, n. 1 (H. & B.'s notes).

[9] Ipswich M'f'g Co. *v.* Story, 5 Met. 313; Pusey *v.* Clemson, 9 S. & R. 208; 2 Shars. Blk. 512 n.

Marriage.

As a general rule a contract made between parties who subsequently intermarry is extinguished by the marriage. This results from the principle that husband and wife are one in law.[1] But a covenant or contract by a man with a woman is not destroyed by their marriage where the act to be performed is future, to be done after the marriage is determined. Thus, if a man in contemplation of marriage executes a bond conditioned for the payment of a sum of money to his intended wife if she survive him, the bond is not released by their marriage.[2]

Arrest for Debt.

Before arrest for debt was abolished, the arrest of a debtor upon a *capias ad satisfaciendum* amounted to a discharge and satisfaction of the debt.[3]

Bankruptcy.

A bankrupt law provides a statutory mode of discharge. By procuring a discharge in bankruptcy, the debtor is released from those debts which are provable under the provisions of the bankrupt law. We shall not enter upon a consideration of these laws, but simply mention bankruptcy as a mode of discharge.

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[1] Phillips *v.* Barnet, L. R. 1 Q. B. D. 439–440.

[2] Milbourn *v.* Ewart, 5 T. R. 381; Fitzgerald *v.* Fitzgerald, L. R. 2 P. C. 83.

[3] Sharpe *v.* Speckenagle, 3 S. & R. 467; Snevily *v.* Read, 9 Watts 396; Lathrop *v.* Briggs, 8 Cowen 171; Ransom *v.* Keyes, 9 Id. 128: Sm. on Conts. *109.

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